RATNA SARI ARIF & ORS v. THE MAYOR OF THE CITY OF KOTA KINABALU & ORS

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ALIZATUL KHAIR OSMAN JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: S-01-319-09-2013]
25 APRIL 2016

CIVIL PROCEDURE: *Judicial review – Application for – Delay in filing application for judicial review – Application for judicial review to quash building approval and re-zoning decision – Whether application filed within time – When ground of application first arose – Rules of Court 2012, O. 53 r. 3(6)*

The appellants were owners of properties neighbouring a parcel of land to be developed by the third respondent. At the High Court, the appellants applied for a judicial review under O. 53 of the Rules of Court 2012 ('the ROC') to quash the building approval and re-zoning decision by the first and second respondents. In resisting the appellants' application, the respondents raised the issue of delay. The High Court Judge decided in favour of the respondents and in dismissing the appellants' application for judicial review, held that it was filed outside the time frame of three months prescribed under O. 53 r. 3(6) of the ROC. Hence, the present appeal. The primary issue highlighted for the court's adjudication was whether the appellants' application for judicial review was made within three months from the date when the grounds of application first arose, as provided for in O. 53 r. 3(6) of the ROC. The appellants claimed that they had actual knowledge of the planning approvals and re-zoning decision in November 2012 when the respondents released a press statement and that was when the grounds of their application first arose. The respondents argued that (i) the appellants were informed of the re-zoning *via* a letter by the first respondent in December 2010; or (ii) the appellants acknowledged receipt of the first respondent's letter in January 2011.

Held (allowing appeal; setting aside decision of the High Court)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The letter dated December 2010 from the first respondent indicated that the re-zoning of the land was approved in 1994. The appellants had attached to their letter in November 2012 to the first respondent a circular ('the 2001 circular') which superseded any re-zoning approval that might have been decided upon by the second respondent in 1994. Until the date of the first respondent's press statement in November 2012, it appeared that the 2001 circular was still in force and the 1994 decision on re-zoning was no longer valid. Therefore, the appellants'

position that until November 2012, there was no decision that could constitute a ground of application under O. 53 r. 3 of the ROC was well-supported by law and evidence. (paras 27-29)

(2) The appellants were correct when they contended that until the first respondent confirmed by his press statement as published in November 2012, approvals had in fact been given, the grounds for making an application under O. 53 of the ROC had not arisen. Furthermore, none of the letters from the appellants to the first respondent indicated that they knew of any approval having been granted by the first respondent for the development. While the appellants knew of the hoarding and the earthworks activities which indicated that some development was being undertaken on the land, that knowledge could not be equated to knowledge that approval had in fact been given by the authorities. In the circumstances, the period of three months in O. 53 r. 3(6) of the ROC could only begin to run from the time when the appellants knew for certain that such approval and re-zoning decision had been made. (paras 48, 49, 52, 55 & 56)

Case(s) referred to:
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 53 r. 3(6)

For the appellants - Sharatha Masyaroh John Ridwan Lincoln; M/s Voo & Co
For the respondents - Zaleha Rose Hj Pandin, Dayangku Fazidah Hatun Pg Bagun; Senior State Counsel, Sabah

[Editor's note: Appeal from High Court, Kota Kinabalu; Judicial Review No: BK1-13JR-2-2-2013 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This was an appeal against the decision of the High Court at Kota Kinabalu which dismissed the application by the appellants for judicial review to quash the building approval and re-zoning decision by the first and second respondents. The application was dismissed pursuant to the objection raised by the respondents that the application was not made within the prescribed time.

[2] The parties are referred to in this judgment as they were in the High Court.

Brief Background Facts

[3] The brief background facts were summarised by the learned High Court Judge in his judgment.

[4] The subject matter of this case was the planning and building approvals given by the first respondent, and the re-zoning decision made by the second respondent, in respect of development to be undertaken by the third respondent on a parcel of land known as TL 017522593 ("subject land").

[5] The applicants were owners of properties neighbouring the subject land. The proposed development was a 13-storey condominium ("development").

[6] The applicants sought to have the approvals quashed and future approvals prohibited from being granted.

In The High Court

[7] The appellants filed their application for leave under O. 53 of the Rules of Court 2012 ("O. 53") on 6 February 2013.

[8] In their statement filed pursuant to O. 53, unfairness, irrationality, unreasonableness and unlawfulness were cited as the basis of the challenge against the decisions of the first and second respondents in relation to the subject land and the development.

[9] In the course of oral submissions before the High Court, the respondents raised the issue of delay. According to them the applicants knew of the decisions of the first and second respondents more than three months before the application for judicial review was filed.

[10] The learned High Court Judge, relying on the Federal Court decision in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193, decided to deal with the issue of delay first.

[11] The learned High Court Judge held that the application for judicial review by the applicants was made outside the time frame of three months prescribed in O. 53 r. 3 para. (6) of the Rules of Court 2012. Following the Federal Court decision in *Wong Kin Hoong*, the learned High Court Judge held that:

> ... Since there is evidence that the applicants were aware of the re-zoning decision and the building approval more than three months before the filing of the judicial review leave application, I am constrained to hold that the application should be dismissed

and consequently dismissed the applicants' application for leave.

[12] Against that dismissal of their application for leave by the High Court on the sole ground of delay, the applicants appealed to this court.

In The Court Of Appeal

[13] The only issue before this court was whether the application by the applicants for judicial review was made "within three months from the date when the grounds of application first arose" as provided for in r. 3, para. (6), of O. 53.

[14] The respondents submitted that the applicants were aware of the re-zoning of the subject land by the second respondent:

(a) in December 2010 when they were informed of the re-zoning by the first respondent by letter dated 3 December 2010 that the re-zoning of the subject land was approved by the second respondent on 19 December 1994; or

(b) on 19 January 2011 when the applicants acknowledged receipt of the first respondent's letter dated 19 January 2011 concerning the development on the subject land.

[15] On the planning approval for the development, the respondents submitted that the applicants knew of the fresh approval granted by the first respondent due to the various letters having been sent to the first respondent over a two year period, as well as meetings held with the first respondent's officers.

[16] The respondents also pointed out to the reports published on 3 November 2012 in the newspapers of a press conference held by the applicants and other owners of properties neighbouring the subject land. The press conference, as reported, showed, according to the respondents, that the applicants knew then of the approval for the development.

[17] The applicants however submitted that when they went to the office of the Director of State Town and Regional Planning Department to check on the zoning of the subject land, they were informed that it was zoned as ridge conservation area. They were given an extract of the draft Kota Kinabalu Local Plan which showed such zoning.

[18] It was also the applicants' position that as the first respondent had claimed that the greater Kota Kinabalu scheme was never approved or adopted, there could not be in law any re-zoning under that scheme in 1994. Hence that re-zoning was not valid.

[19] The applicants further submitted that the draft Kota Kinabalu Plan 2020 which the respondents claimed would replace all existing draft and approved schemes applying in the area was not yet in force. The notification of public consultation was only published in the *gazette* on 14 July 2011 and the notice was only published in the newspaper on 13 September 2011. The plan was only put up for public exhibition on 26 September 2011.

[20] On the planning approval, the summary of the applicants' submission was that they became concerned when they saw hoardings and earthworks on the subject land. Despite their requests, they were not informed by the first and second respondents whether in fact planning approval had been given to the third respondent.

[21] The applicants submitted that it was only after their press statement was published on 3 November 2012 that the first respondent issued a press statement, as published in the newspapers on 9 November 2012, stating that development plans and building and engineering plans had been approved to the third respondent for the development although the third respondent had not yet been given permission to commence construction works.

[22] The appellants claimed they had actual knowledge of the planning approvals and re-zoning decision on the date of the first respondent's press statement, and that was when the grounds of their application first arose.

Decision

[23] We were mindful of the limited role of an appellate court in relation to findings of facts made by the court of first instance.

[24] In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 the Court of Appeal held that "an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence". On appeal to the Federal Court (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309) the Federal Court held that the test of "insufficient judicial appreciation of evidence" used by the Court of Appeal in that case was related to the process of determining whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence.

[25] We had therefore carefully examined the documents in the record of appeal to ascertain if the learned High Court Judge had arrived at his decision correctly on the basis of the relevant law and evidence before the court.

The Re-zoning

[26] Under the Town and Country Planning Ordinance of Sabah a scheme (which term was only subsequently defined when the Ordinance was amended in 2002) involving a local plan could only come into force in an area upon approval being given by the Yang di-Pertua Negeri, and the date of coming into force would be the date of publication in the *gazette* of notice of such approval. Any modification of such a scheme would have to go through the same process as the original scheme. This meant that the approval of the Yang di-Pertua Negeri was also required for such modification.

[27] The letter dated 3 December 2010 from the first respondent indicated that the re-zoning of the land was approved in 1994. It did not state how the original zoning was made. It merely stated that the re-zoning "was approved at the Central Town and Country Planning Board's meeting held on 19 December 1994".

[28] The applicants had attached to their letter dated 15 November 2010 to the first respondent a circular from the Town and Country Planning Department dated 18 June 2001 ("2001 circular") which clearly showed a policy change that disallowed even medium density development in ridge conservation areas. That circular was addressed to the Mayor of the city of Kota Kinabalu as well as other local authorities in Sabah. In effect it revoked an earlier decision of the Central Town and Country Planning Board made on 15 September 1984 allowing medium density development in ridge conservation areas below a stipulated contour level.

[29] The effect of the 2001 circular was to supersede any re-zoning approval that may have been decided upon by the second respondent in 1994.

[30] There was no evidence that the 2001 circular had been revoked.

[31] In our view, given the statutory requirements for the procedure to be followed to modify a scheme under the Town and Country Planning Ordinance of Sabah, in all probabilities there was no scheme under that Ordinance in force in the area at the time of the circular and the claimed re-zoning in 1994. Otherwise an administrative directive as contained in the 2001 circular could not be validly issued.

[32] Our view was supported by the fact that from the various *gazette* notifications exhibited in the affidavits, it could be seen that proposals to have a local plan for Kota Kinabalu had been made from time to time since 1984 but none had come into force.

[33] The applicants' claim that the subject land was situated in a ridge conservation area was disputed by the respondents. However, the minutes of several meetings of the high risk development technical committee clearly included the development in their discussions. It was noted in the minutes of the committee meeting on 22 June 2012 that "on the EIA requirement, the C&S engineer had further explained to JPAS that the development is not on 20 degree slope but on level ground". We noted that the C&S engineer was the engineer of the development and this note was in relation to the EIA requirement. This note was not, in our view, evidence disproving the contention of the applicants that the subject land was situated in a ridge conservation area.

[34] The Draft Kota Kinabalu Local Plan 2020 which was tendered in court showed that the area in which the subject land was situated was designated as "Residential Special (Ridge Conservation)". The applicants'

claim that it was also designated as ridge conservation area under the earlier drafts appeared to be well supported by the Draft Kota Kinabalu Local Plan 2020. The natural conclusion to be drawn was that the area must have all along been a ridge conservation area.

[35] The first and second respondents claimed (through the affidavit of Alijus @ Mohd Ali bin Sipil affirmed on 19 June 2013) that the Draft Kota Kinabalu Local Plan 2020 published in the *gazette* on 25 March 2010, 8 July 2010 and 14 July 2011 would replace all existing draft and approved schemes applying in the area. Under the Draft Kota Kinabalu Local Plan 2020, the area in which the subject land is situated would be zoned as an area in which medium density development would be allowed.

[36] The Draft Kota Kinabalu Plan 2020 was, at the material time, still under public scrutiny. As we have mentioned above, the approval of the Yang di-Pertua Negeri was required before a scheme (which included a local plan) could come into force. That approval stage would only come after a few other steps had been taken upon completion of the public scrutiny stage.

[37] The Draft Kota Kinabalu Plan 2020 therefore was not yet in force at the material time.

[38] Until the date of the first respondent's press statement on 9 November 2012, it appeared that the 2001 circular was still in force and the 1994 decision on re-zoning was no longer valid. Thus, in our considered view, the applicants' position that until 9 November 2012 there was no decision that could constitute a ground of application under O. 53 r. 3 of the Rules of Court 2012 was well supported by the law and the evidence before the court.

The Planning Approval

[39] The relevant portions of the letter written to the first respondent on 15 November 2010 by the applicants and several other owners of land in the neighbourhood of the subject land are reproduced below:

> We the owners and residents of T.L.017524024; T.L. 017519256; T.L. 017519247; T.L. 017519934; T.L. 017523778 and others at Jalan Bukit Bendera Lower, Signal Hill are writing to you on the very serious concerns we have regarding an approval for a multi storey condominium building that Kota Kinabalu City Hall granted for T.L. 017522593 (the subject land).
>
> We understand that Kota Kinabalu City Hall's approval for a multi storey apartment building despite the subject land being zoned Ridge Conservation in the current Statutory Plan for Kota Kinabalu City Draft Kota Kinabalu Local Plan (Plan No 01150230/B) is in breach of the Town and Country Planning Ordinance (Sabah Cap. 141) as explained below.
>
> A Circular by the Secretary of the Central Town and Country Planning Board J.P.B.W.99/63/Jld.VII 102 dated 18 June 2001 addressed to your good self-confirmed that where residential development is permissible within Ridge Conservation areas, it shall be low density at 0.25 hectares

> per lot. This Circular replaced the previous Central Board Policy dated 15 September 1984 which had allowed medium density residential development within Ridge Conservation areas only in situations where the height of the land is below 250 feet. This being the case we urge Kota Kinabalu City Hall to immediately withdraw the said approval.
>
> ...
>
> In the meantime, we request we be provided with written advice on the approval that was granted to a development on T.L. 017522593 and also an urgent meeting with Kota Kinabalu City Hall's Director of Town Planning before we decide on the next course of action that we should take on this matter.

[40] The first respondent responded to the letter with a letter dated 3 December 2010. The letter explained that:

> Base [*sic*] on the City Hall's record, development and building plan for the development of the above site was submitted before and approved on 27.06.07 & 03.03.2009 respectively. However the approval granted has since lapsed ie, valid for two (2) years (Development Plan) & one (1) year (Building Plan). The rezoning of the area to Residential (B) was approved at the Central Town & Country Planning Board's meeting held on 19.12.1994.

[41] By that letter dated 3 December 2010, the first respondent had made it clear that there was in fact no planning approval in force as of the date of the applicants' letter and the date of the first respondent's letter. No decision had been made then that could form the basis of a challenge by way of judicial review.

[42] The applicants responded to the first respondent's letter by their letter dated 19 January 2011. However, nothing in that letter could possibly indicate knowledge of any planning approval having been given for the development. In relation to the planning approval, the letter merely stated:

> While the Development and Building Plan approvals granted by DBKK may have lapsed, you did not give us any assurance that those plans will not be reactivated if the applicant were to resubmit the same or similar plans or pay the required fee.

[43] Some eight months later, the third applicant and two other landowners wrote to the first respondent seeking an urgent meeting with the first respondent. In that letter (dated 4 August 2011) they raised their concern as they noticed the owner of the subject land "had erected new hoarding on the block's boundaries". They were concerned "that the previous development approval which had lapsed has been resubmitted for validation and possibly even approved by Dewan Bandaraya Kota Kinabalu". They sought the meeting to seek confirmation on the matter. That letter also indicated that there was no reply by the first respondent to their letter of 19 January 2011.

[44] Quite obviously no response came from the first respondent as on 23 October 2012 (some 14 months later), the applicants and other neighbours of the subject land wrote to the first respondent through their solicitor, informing the first respondent that they had "recently noticed that earth works and piling have commenced and are being carried out" on the subject land. They also claimed that "there is no signboard on display at the site indicating that the owner has obtained all the necessary permits and approvals to carry out any works at the site". They requested the first respondent as the relevant authority to "investigate and issue the necessary stop work orders immediately".

[45] A letter dated the same day and having the same contents was also sent to the Controller of Housing of the Local Government and Housing Ministry in Kota Kinabalu.

[46] On 25 October 2012, two days after the date of the letter, they sent to the first respondent and to the controller photographs of the activities being undertaken on the subject land at the material time.

[47] Apparently no response came from the first respondent or the controller. This led to the applicants and some of the residents neighbouring the subject land to go to the press. A report of their unhappiness at being "kept in the dark by the approving authorities despite writing to them over a two year period ever since knowledge of the project came to their attention" was published in the daily express and the Borneo post on 3 November 2012.

[48] Thus far it can be seen that none of the letters from the applicants to the first respondent indicated that they knew of any approval having been granted by the first respondent for the development.

[49] Contrary to the interpretation given by the learned High Court Judge to the contents of the letters, while the applicants knew of the hoarding and the earthworks activities which indicated that some development was being undertaken on the subject land, that knowledge could not be equated to knowledge that approval had in fact been given by the authorities. That lack of knowledge was precisely the reason for their requests for information through those letters.

[50] The first respondent's response came by way of a press statement as published in the newspapers on 9 November 2012.

[51] In that statement the first respondent referred to the approval which was given in 1994 on the re-zoning of the area and to the planning approvals which had been given earlier (presumably the 2007 and 2009 approvals which the first respondent indicated in his letter as mentioned above had lapsed). The first respondent stated in the press statement that "what the City Hall did was only to re-validate what has already been approved and all procedures were adhered to".

[52] In our considered view, given all the relevant evidence in relation to this issue, the applicants were correct when they contended that until the first respondent confirmed by his press statement as published on 9 November 2012 that approvals had in fact been given (by way of validation of earlier lapsed approvals), the grounds for making an application under O. 53 had not arisen.

Conclusion

[53] Having examined closely the relevant affidavits and documentary exhibits in this case, we were satisfied that the learned High Court Judge had failed to properly and sufficiently evaluate the evidence adduced before the court. This warranted our intervention.

[54] As stated in the opening paragraph of the learned High Court Judge's judgment, the application by the applicants was for "judicial review to quash a building approval and a re-zoning decision" by the first and second respondents.

[55] In our considered view, if the evidence had been properly and sufficiently evaluated, it would be clear that the period of three months in O. 53 r. 3 para. (6) could only begin to run from that point in time when the applicants knew for certain that such approval and re-zoning decision had been made.

[56] As we have discussed above, until the press statement was made by the first respondent on 9 November 2012 the applicants could not be certain that the planning approvals had in fact been granted or the re-zoning decision had in fact been made.

[57] Based on the considerations we highlighted above we allowed this appeal and set aside the order of the High Court. We ordered that the case proceed in the High Court.